STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED November 6, 2003
v	No. 240742 Macomb Circuit Court
DONALD JAMES FIELDS, Defendant-Appellant.	LC No. 01-003532-FH

Before: Gage, P.J., and White and Cooper, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of first-degree home invasion, MCL 750.110a(2), and assault with intent to commit second-degree criminal sexual conduct, MCL 750.520g(2), for which he was sentenced to twelve to twenty years' imprisonment and two to five years' imprisonment, respectively. We affirm, but remand for articulation or resentencing.

I

Defendant asserts that he is entitled to a new trial because he was denied the effective assistance of trial counsel by counsel's failure to 1) investigate defendant's criminal history and object to the prosecution's use of a prior "conviction" that was not a conviction, 2) object to the admission of a letter written in connection with a previously withdrawn nolo contendere plea, 3) proceed with a motion to suppress defendant's confession, 4) conduct a proper voir dire, 5) make an opening statement to articulate a defense, and 6) cross-examine prosecution witnesses. We conclude that a new trial is not warranted.

To support a claim of ineffective assistance of counsel, defendant must establish that his counsel's performance was below an objective standard of reasonableness under prevailing professional norms and that a reasonable probability exists that, in the absence of counsel's unprofessional errors, the outcome of the proceedings would have been different. *People v Sabin (On Second Remand)*, 242 Mich App 656, 659; 620 NW2d 19 (2000). "A defendant must overcome a strong presumption that the assistance of his counsel was sound trial strategy, and he must show that, but for counsel's error, the outcome of the trial would have been different." *Id.*

Defendant first claims that he was denied the effective assistance of counsel when defense counsel failed to investigate defendant's prior criminal history, and thereby failed to ascertain that defendant had not been "convicted" of receiving and concealing stolen property ["RCSP"], but rather, had been granted trainee status pursuant to the Holmes Youthful Trainee Act (HYTA). MCL 762.11, *et seq*. Defendant argues that because the grant of HYTA status does not result in a criminal conviction, MCL 762.14, the use of the RCSP charge to impeach defendant pursuant to MRE 609 was improper.

Following voir dire, the prosecutor sought a ruling on the admissibility of a May 20, 1998 RCSP "conviction" to impeach defendant, should he decide to testify. Defense counsel stated "[w]e do not object . . . I'm saying that the Prosecution have [sic] grounds to (inaudible words) that we have no legal basis to keep it out." During trial, defendant first waived his right to testify; however, when defendant was reconsidering his decision not to testify, defense counsel asked the court to reconsider the admissibility of the conviction, although he did not object on the basis that there was no conviction. The trial court agreed with the prosecutor that the "conviction" was a recent offense, dissimilar to the alleged crime in the instant case, and more probative than prejudicial, and ruled that the evidence of defendant's prior "conviction" could be used for impeachment purposes. On direct examination of defendant, defense counsel elicited defendant's prior "conviction." On cross-examination, the prosecutor reiterated and clarified defendant's prior "conviction." The prosecutor did not mention the prior "conviction" during closing argument or rebuttal.

Defendant argues that defense counsel's failure to investigate the nature of the prior charge and failure to exclude its admission from trial constituted ineffective assistance of counsel. Accepting that counsel should have determined that there was no conviction, and should have opposed the prosecution's motion on this basis, we conclude that defendant has failed to show the requisite prejudice. By eliciting evidence of defendant's prior "conviction" on direct examination, defense counsel minimized the impact of such information. The reference to defendant's prior record was brief, and the prosecutor did not refer to defendant's prior record during closing argument or rebuttal. We are satisfied that there is no reasonable probability that, but for defense counsel's error, the outcome of the proceedings would have been different. *Sabin (On Second Remand), supra* at 659. Anthony Ali identified defendant as the man who was in his home on the night of the incident; Angela Ali testified that defendant attempted to pull back the sheets on her bed and pulled on the elastic waistband of her underwear; Officer May apprehended defendant a short distance from the Alis' home minutes after the 911 call was placed, based on a description of his clothing and vehicle; defendant confessed to Detective Torey; and defendant implicated himself in a letter to the trial court. Under these circumstances, we conclude that the reference to a prior conviction did not affect the outcome of the trial.

Defendant next claims that he was denied the effective assistance of counsel when defense counsel ultimately stipulated to the admission of defendant's letter to the trial court, concerning defendant's desire to revoke his previous withdrawal of a nolo contendere plea and accept the sentence that the court indicated it would impose:

> To the Honorable Chrzanowski, I am writing to you to [reverse] my decision that [I] made in your court room on 2/13/02. Would you please give me a new court date as soon as possible. I have decided to take the sentence that you was [sic]

> going to offer me because I want to put this all behind [me] and tell the family I'm sorry.

Defendant initially offered a nolo contendere plea, which was taken under advisement pending the completion of the presentence investigation report, and subject to defendant's right to withdraw the plea. At the sentencing hearing, the court overruled defendant's objection to the scoring of an offense variable, and stated that defendant would receive the maximum of the minimum. Defendant subsequently withdrew his plea. On February 27, 2002, the trial court arranged to have defendant brought before it to discuss defendant's letter, apparently written after defendant withdrew his nolo contendere plea on February 13, 2002. The trial court scheduled a March 12, 2002 hearing at which defendant would be able to again tender a nolo contendere plea and be sentenced. However, at the March 12, 2002 hearing, defendant again changed his mind, and announced that he was "going to trial." At that point, the prosecutor informed defendant and the trial court of his intent to introduce the letter at trial, as an admission. The trial court ruled that the letter would be admissible.

At trial, the prosecutor sought to clarify the trial court's ruling on the admissibility of the letter, arguing that it was an admission, there was no evidentiary rule precluding its admissibility, and that if defendant took the stand and denied he wrote the letter, the prosecutor would impeach him with a copy of the transcript or a videotape of the February 27, 2002 hearing, where defendant stated that he wrote the letter. Defense counsel argued that the letter was inadmissible because the "prejudicial effect of this letter outweighs the probative value because there's no testimony that my client really authored this particular letter." Defense counsel did not argue that the letter was inadmissible under MRE 410. The trial court shared defense counsel's concerns regarding the authenticity of the letter, and informed the prosecution that it would have to lay a proper foundation before the letter would be admitted into evidence, by reading the transcript of the proceeding or playing the videotape of the proceeding to the jury. The prosecutor suggested "perhaps then before we leave today we can take the opportunity to examine one of the archived tapes of that proceeding so [defense counsel] has the benefit of seeing the transcript and the video before we come back tomorrow."

The following day, presumably after reviewing the tape and transcript of the February 27, 2002 proceeding, the prosecution moved, and defense counsel stipulated, to the admission of the letter into evidence and to the fact that it was written by defendant. The trial court admitted the letter into evidence, and it was read into the record.

On appeal, defendant argues that his counsel was ineffective for failing to argue that the letter was inadmissible as a statement made in connection with a previously withdrawn nolo contendere plea, pursuant to MRE 410, which provides in pertinent part:

> Except as otherwise provided in this rule, evidence of the following is not, in any civil or criminal proceeding, admissible against the defendant who made the plea or was a participant in the plea discussions:
>
> (1) A plea of guilty which was later withdrawn;
>
> * * *

> (3) Any statement made in the course of any proceeding under MCR 6.302 . . . regarding either of the foregoing pleas [guilty and nolo contendere.]

We first observe that the letter does not appear fall within the literal terms of MRE 410. However, while not within the literal terms of MRE 410, it can certainly be argued that the letter falls within the spirit of the rule, and that its admission was therefore improper. Nevertheless, even if we were to conclude that the letter was inadmissible, and that counsel should have objected to its admission, defendant cannot establish the requisite prejudice where the evidence against him was overwhelming. Defendant was identified at trial as the individual who broke into the Alis' home. The record also shows that he was apprehended near the Alis' home in a vehicle and clothing that matched the description provided by the Alis to the police. More importantly, there was evidence that defendant confessed to the instant crimes during an interview with Detective Torey.

Defendant next claims that he was denied the effective assistance of counsel when defense counsel failed to pursue the motion to suppress originally brought by defendant's first appointed counsel. Defendant argues on appeal that "had [defense counsel] challenged defendant's confession on general voluntariness grounds, the trial court would have been required to suppress the statement" and that "the prosecutor could not have established by a preponderance of the evidence that defendant's statement was voluntary."

In *People v Cipriano*, 431 Mich 315, 334; 429 NW2d 781 (1988), the Court set forth a nonexclusive list of factors for a trial court to consider in determining whether a statement is voluntary:

> The age of the accused; his lack of education or his intelligence level, the extent of his previous experience with the police; the repeated and prolonged nature of the questioning; the length of the detention of the accused before he gave the statement in question; the lack of any advice to the accused of his constitutional rights; whether there was an unnecessary delay in bringing him before a magistrate before he gave the confession; whether the accused was injured, intoxicated or drugged, or in ill health when he gave the statement; whether the accused was deprived of food, sleep, or medical attention; whether the accused was physically abused; and whether the suspect was threatened with abuse.

No single factor is determinative, and "the ultimate test of admissibility is whether the totality of the circumstances surrounding the making of the confession indicates that it was freely and voluntarily made." *People v Sexton*, 461 Mich 746, 753; 609 NW2d 822 (2000); *Cipriano, supra* at 334.

Here, Detective Torey advised defendant of his *Miranda*[1] rights, and defendant agreed to talk to him. Torey interviewed defendant in a booking room that was twelve feet by fifteen feet

[1] *Miranda v Arizona,* 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).

in size. Defendant informed Torey that he had completed eighth grade, could understand, read, and write English, and had consumed one beer the previous evening, but was not under the influence of any alcohol or drugs at the time of the interview. Defendant was not handcuffed during the thirty-minute interview, and did not ask for food or drink at any time. Torey testified that he did not have any concerns about defendant's capacity to understand, despite the fact that defendant had consumed one beer the previous evening and only had an eighth grade education: "He understood me, I understood him." Torey testified that defendant was lucid and knew what was going on; Torey described defendant as "articulate." In contrast, defendant testified that he had been at a party until 1:30 or 2:00 am, and that while at the party, he had consumed two forty-ounce beers, one half-shot of Hennessey, and three marijuana joints. He testified that he did not remember being interviewed by Torey.

The break-in occurred shortly before 4:00 a.m. Defendant was observed driving his vehicle shortly thereafter. The officer who arrested him testified that he could not recall if defendant's speech was slurred, but that he "seemed like he might have been a little high" based on his being very complacent and his "carefree actions." Torey did not interview defendant until 9:10 a.m. It is unlikely that had counsel pursued the prior request for a *Walker*[2] hearing, the court would conclude that defendant was still under the influence of the liquor and marijuana when he was interviewed at least five hours after leaving the party. The court would likely have found incredible defendant's statement that he did not recall the interview. Further, defendant's citations to the record do not support his assertion that Torey's testimony shows that defendant's statement was coerced. The record reveals nothing in the circumstances surrounding defendant's interview with Torey that indicates coercive conduct on the part of the police or that the confession was not freely and voluntarily given. Accordingly, the confession was properly admitted at trial, and defendant has not demonstrated that defense counsel's performance fell below an objective standard of reasonableness, or that a reasonable probability exists that but for the admission of defendant's confession, the outcome of the trial would have been different. *Sabin (On Second Remand), supra* at 659.

Defendant next claims that he was denied the effective assistance of counsel when defense counsel failed to properly voir dire the jury, where he "asked the jury no questions and exercised no peremptory challenges or challenges for cause." Defendant claims that defense counsel should have questioned a preschool teacher regarding whether she could set aside her experiences with children and decide the case on the evidence presented. Additionally, defendant claims that defense counsel should have asked the potential jurors, most of whom had children or grandchildren the same ages as the girls involved in the instant case, whether they could set aside the notion that children always tell the truth.

Defendant relies on *People v Jenkins*, 99 Mich App 518; 297 NW2d 706 (1980); however, *Jenkins* involved egregious facts not presented here. In *Jenkins*, defense counsel "left the courtroom during voir dire of the jury and indicated magnanimously that he would take the first 12 jurors picked just to save time." *Id*. at 520. Further, defense counsel's cross-examination

[2] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

in *Jenkins* "was damaging to the defendant and it was interrupted only by his sporadic fits of unexplained laughter." *Id*. at 519-520.

In the instant case, defense counsel was present during voir dire, which lasted for approximately 1¼ hours. While he chose not to question any jurors, challenge any jurors for cause, or exercise any peremptory challenges, the trial court and the prosecutor questioned the potential jurors. Without the benefit of a *Ginther*[3] hearing, this Court can only speculate that defense counsel was satisfied that the questions posed by the prosecutor and trial court regarding the backgrounds of the prospective jurors and their abilities to remain fair and impartial were sufficient, and that he did not want to be redundant. Additionally, defense counsel may well have made a strategic decision not to challenge the preschool teacher regarding her attitude toward and experiences with young children, believing that based on her experience she would be familiar with situations in which young children did not tell the truth, or had active imaginations.

An attorney's decisions relating to the selection of jurors generally involve matters of trial strategy, which this Court normally declines to evaluate with the benefit of hindsight. *People v Johnson*, 245 Mich App 243, 259; 631 NW2d 1 (2001). Defendant has not demonstrated that the performance of defense counsel during voir dire fell below an objective standard of reasonableness or a reasonable probability that, but for defense counsel's failure to actively participate in the jury voir dire, the outcome of the proceedings would have been different. *Sabin (On Second Remand), supra*, 242 Mich App at 659.

Defendant next claims that he was denied the effective assistance of counsel when defense counsel failed to make an opening statement to articulate a defense theory, and failed to vigorously cross-examine Angela, Pamela, and Anthony Ali. Defendant claims that defense counsel's theory of the case was that "the police did not do their jobs because they did not take complete reports and destroyed notes and that they coerced defendant into confessing." Defendant argues that counsel "should have advocated defendant's claim of intoxication."

The record reveals that defense counsel's theory of the case did, in fact, focus on the voluntariness and reliability of defendant's statement, the lack of evidence in support of the allegation that defendant pulled on the waistband of Angela's underwear, the extent to which defendant's intoxication affected his ability to form the requisite intent to commit the charged crimes, and the suggestive nature of the "suspect elimination" conducted in the McDonald's parking lot. Defense counsel focused on the flaws in the prosecution's case, and made a legitimate argument that the prosecution had not met its burden of proving defendant's guilt beyond a reasonable doubt. Defendant has not demonstrated how defense counsel's failure to give an opening statement fell below an objective standard of reasonableness, or that a reasonable probability exists that, had counsel done so, the jury would have found defendant not guilty of the charged offenses. *Sabin (On Second Remand), supra* at 659.

[3] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

Defendant argues that defense counsel "failed to cross examine Angela at all, and what little cross examination he did on her parents concerned inconsequential matters such as whether Pamela had a copy of her statement to the police and the state of the lighting in the living room." However, defense counsel had little to gain by attempting to impeach 9-year-old Angela on cross-examination; instead, defense counsel made the strategic decision to refute her claim that defendant pulled on the waistband of her underwear through cross-examination of Torey:

> *Q*. There was [sic] allegations [that the cover was tugged on.]
>
> *A*. That just the covers were tugged on. There was no mention of any underwear being pulled.
>
> * * *
>
> *Q*. And there was nothing like that from my client about tugging on underwear?
>
> *A*. Correct.

Similarly, defense counsel had little to gain by aggressively cross-examining Pamela Ali, where her testimony was not harmful to the defense. Pamela was unable to identify defendant, and lacked knowledge to testify regarding facts that would have supported defendant's case, such as whether defendant was intoxicated or the voluntariness of defendant's statement to Torey.

On cross-examination of Anthony Ali, the only witness able to positively identify defendant, defense counsel attacked his identification. Defense counsel questioned Anthony about the lighting in his home, and elicited testimony that the lighting was dim, and that defendant had his head down when he walked into the living room. Defense counsel also elicited testimony that defendant was the only person the police showed to Anthony at McDonald's, and that a lineup was never conducted.

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). "This Court will not substitute its judgment for that of counsel regarding matters of trial strategy, nor will it assess counsel's competence with the benefit of hindsight." *Id.* at 76-77. Defendant has not demonstrated that defense counsel's conduct fell below an objective standard of reasonableness, or that a reasonable probability exists that if defense counsel had cross-examined the witnesses more extensively, the outcome of the proceedings would have been different. *Sabin (On Second Remand)*, *supra* at 659. Accordingly, defendant was not denied the effective assistance of counsel.

II

Defendant next asserts that he must be resentenced on the home invasion conviction because the trial court failed to acknowledge that it was departing from the statutory guidelines range and failed to articulate any substantial and compelling reasons for the departure. The prosecution concedes that a remand is appropriate, but argues that the scope should be limited to the trial court's articulation of its substantial and compelling reasons for departure.

The record contains no indication that the trial court was aware that the sentence it imposed exceeded the guidelines. Under this circumstance, we remand for resentencing or articulation of substantial and compelling reasons for departure, as the trial court deems appropriate. See *People v Babcock*, 469 Mich 247; 666 NW2d 231 (2003).

Defendant's convictions are affirmed, and the case is remanded for resentencing or articulation of substantial and compelling reasons to justify the court's departure. We do not retain jurisdiction.

/s/ Hilda R. Gage
/s/ Helene N. White
/s/ Jessica R. Cooper